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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1091

September Term, 2007

Filed On:
March 26, 2008

Calvin David Fox,
Petitioner

v.

Securities and Exchange Commission,
Respondent

ON PETITION FOR REVIEW OF ORDERS OF THE SECURITIES AND EXCHANGE COMMISSION

BEFORE: Randolph, Tatel, and Garland, Circuit Judges

JUDGMENT

This petition for review of orders of the Securities and Exchange Commission was considered on the briefs and appendix filed by the parties. It is

ORDERED AND ADJUDGED that the Securities and Exchange Commission order filed November 30, 2006, dismissing petitioner's appeal, and its order filed March 13, 2007, denying his motion for reconsideration, be affirmed. Petitioner failed to exhaust his administrative remedies before the New

York Stock Exchange, and as a result, the Commission properly dismissed his appeal from the Exchange. See NYSE Rule 476(e) (requiring that requests for review to the Exchange Board of Directors be made with 25 days after notice of a Hearing Panel's decision). The Hearing Panel's determination was served in compliance with Exchange rules and was not constitutionally deficient, because it was reasonably calculated to apprise petitioner of his rights. See Jones v. Flowers, 547 U.S. 220, 226 (2006); NYSE Rule 476(d). Petitioner has also not shown that service of the Hearing Panel's decision by mail violated his equal protection rights, see Noble v. U.S. Parole Comm'n, 194 F.3d 152, 154 (D.C. Cir. 1999), or that the Commission's conclusion that the Hearing Panel's decision was properly served by mail was otherwise arbitrary, capricious, an abuse of discretion, or contrary to law, see PMD Produce Brokerage Corp. V. U.S. Dep't of Agriculture, 234 F.3d 48, 51 (D.C. Cir. 2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54840 / November 30, 2006

Admin. Proc. File No. 3-11062

In the Matter of the Application of

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, FL 33468

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

ORDER DISMISSING APPEAL

Calvin David Fox appeals from disciplinary action taken against him by the New York Stock Exchange, Inc. ("NYSE" or "Exchange"). An NYSE hearing panel found that Fox violated NYSE Rule 476(a)(6) by engaging in conduct inconsistent with just and equitable principles of trade. 1/ This proceeding has previously been before us; on October 31, 2003, we remanded the decision of the NYSE for clarification and explanation of its findings. 2/ In the remand decision, we asked the NYSE to address whether Fox's alleged conduct was

1/ NYSE Rule 476(a)(6).

2/ Calvin David Fox, Securities Exchange Act Rel. No. 48731 (Oct. 31, 2003), 81 SEC Docket 2017.

in bad faith or unethical. 3/ Following remand, an NYSE hearing panel found in a March 27, 2006 decision ("hearing Panel Decision") that Fox's alleged conduct was in bad faith and unethical. Evidenced submitted by the Exchange, including copies of a postmarked envelope and certified mail receipts, establishes that the NYSE mailed the Hearing Panel Decision to Fox on March 31, 2006. Fox acknowledges that he received it on April 6. The accompanying transmittal letter informed Fox that, if he were aggrieved by the Hearing Panel Decision, he could, "pursuant to Exchange Rule 476, a copy of which is enclosed, request a review of the determination and/or penalty within 25 days of the date of this letter." The NYSE further advised Fox that "[f]ailure to exhaust your administrative rights at the Exchange may affect your right to SEC review." Fox filed his request for review of the Hearing Panel Decision with the NYSE Board of Directors on April 27, 2006. The Board of Directors denied Fox's request for review as untimely on May 12, 2006. Fox requested Commission review of the NYSE proceeding on May 24, 2006.

We must first determine whether Fox's request to the NYSE Board of Directors was timely under the NYSE's rules. NYSE Rule 476(e) provides that a hearing panel decision becomes final twenty-five days after "notice thereof has been served upon the respondent in the manner provided in [Rule 476] paragraph (d) . . . ." 4/ NYSE Rule 476(f) provides that a request for review by the NYSE Board of Directors shall be made by filing a written request within twenty-five days after notice of the hearing panel decision is served on the respondent. 5/ NYSE Rule 476(d) provides that "[s]ervice shall be deemed effective . . . upon mailing . . . to the respondent at [respondent's last known office address] or place of

residence." 6/ By application of NYSE Rule 476(d), notice of the Hearing Panel Decision was served on Fox on March 31, 2006, and the twenty-five-day time limit began to run as of that date, as the transmittal letter stated. As a consequence, Fox was required to file his request for review no later than April 25, 2006. Fox, therefore, was two days late when he filed his request on April 27, 2008.

Fox argues that the NYSE's rules for service of documents, properly interpreted, provide that service is complete only upon delivery of the documents. Fox states that he received the letter on April 6, 2006, and that, therefore, his April 27 filing was within the twenty-five-day limit specified in NYSE Rule 476. Fox argues that the NYSE's rules on service of process are based on our Rules of Practice and "federal rules." He specifically claims that it "would be a denial of fundamental due process and equal protection" if the term "service" in NYSE Rule 476(d) is not construed to mean "actual receipt" (emphasis deleted), citing to our Rule of Practice 141(a)(2). 7/ That Rule provides that service to an individual of an Order Instituting Proceedings shall be made "by delivering" a copy of such order.

Fox's argument is inconsistent with the plain language of NYSE Rule 476(d) which states that service is effective upon mailing, not actual delivery. Moreover, Fox was specifically notified in the March 31, 2006 letter that he must file any request for review by the NYSE Board of Directors within twenty-five days "of the date of this letter." Fox offers no support for the proposition that NYSE rules "are based" on our Rules of Practice. He offers no explanation for why the unambiguous words "[s]ervice shall be deemed effective . . . upon mailing" in NYSE Rule 476(d) should be construed differently to mean "by delivering"

as provided in our Rule 141(a)(2). Indeed, our Rules 141(b) and 150(d) provide that, for written decisions by a hearing officer, documents that are analogous to NYSE Hearing Panel Decisions, service may be "complete upon mailing." 8/

Given the clarity of the governing NYSE rule, the notice given to Fox in the plainest possible terms in the March 31, 2006 letter itself, and the ample time between Fox's April 6 receipt of the March 31 letter and Hearing Panel Decision and the due date of April 25, overlooking his late filing would be inappropriate. Accordingly, we sustain the NYSE's determination that Fox's request for review was untimely.

Fox's failure to exhaust his remedies at the NYSE precludes our consideration of his application for review. 9/
The precedent on this issue is well settled: "It is clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing review." 10/ Here, Fox did not follow the clear steps provided by NYSE. Fox's appeal must, therefore, be dismissed.

Accordingly, IT IS ORDERED that the above-captioned proceeding be, and it hereby is, dismissed.

By the Commission.

Nancy M.
Morris
Secretary

3/ Cf. Robert J. Jautz, 48 S.E.C. 702, 703-04 (1987) (holding that if only violation alleged by NASD is failure to observe just and equitable principles of trade, there must be a finding of bad faith).

4/ NYSE Rule 476(e).

5/ NYSE Rule 476(f).

6/ NYSE Rule 476(d).

7/ 17 C.F.R. § 201.141(a)(2).

8/ 17 C.F.R. §§ 201.141(b), 201.150(d).

9/ MFS Secs. Corp., Exchange Act Rel. No. 47626 (Apr. 3, 2003), 79 SEC Docket 3612 (appeal dismissed for failure to exhaust NYSE remedies), aff'd, 380 F.3d 611 (2d Cir. 2004); cf. David I. Cassuto, Exchange Act Rel. No. 48087 (June 25, 2003), 80 SEC Docket 1775 (NASD); Gary A. Fox, 55 S.E.C. 1147 (2002) (NASD); Datek Secs. Corp., Exchange Act Rel. No. 32306 (May 14,1993), 54 SEC Docket 199 (late filing of request for review by NASD National Business Conduct Committee); Royal Secs. Corp., 36 S.E.C. 275 (1955) (late filing of request for review by NASD Board of Governors).

10/ Royal Secs. Corp., 36 S.E.C. at 277.

Mary Yeager
Assistant Secretary

NYSE

May 12, 2006

Via Facsimile & Certified Mail
Return Receipt Requested

Mr. Calvin David Fox
PO Box 7900
Jupiter, Florida 33468-7900

RE: **NYSE Hearing Panel Decision 02-110**
Calvin David Fox

Dear Mr. Fox:

This will serve to acknowledge receipt of your letter dated April 27, 2006, and your subsequent correspondence sent via fax on May 4, 2006 and May 5, 2006. Your April 27 letter, which requests review of the above referenced NYSE Hearing Panel Decision issued on March 27, 2006, was received in this office on April 27, 2006.

In accordance with NYSE Rule 476(f), a copy of which is enclosed, a NYSE Hearing Panel Decision shall be final and conclusive twenty-five (25) days after notice of the decision has been served upon the Respondent, unless a request for review is filed within that time period. A request for review that is received by the NYSE after that time period has expired is untimely.

Our records indicate that notice of the above-referenced decision was given to you by letter, dated March 31, 2006. Therefore, the twenty-five (25) day appeal period for this decision expired on April 25, 2006. As indicated above, your letter to the Secretary of the NYSE was received on April 27, two (2) days after the twenty-five day appeal period expired. Accordingly, your request for review of the March 27, 2006 NYSE Hearing Panel Decision 02-110 is untimely.

Sincerely,

Mary Yeager

Enclosure

cc: Steven M. Tanner, Trial Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1091

September Term, 2007

SEC-3-11062r

Filed On:
July 14, 2008

Calvin David Fox,
Petitioner

v.

Securities and Exchange Commission,
Respondent

BEFORE: Randolph, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of petitioner's petition for panel rehearing filed on May 9, 2008, it is
ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:Deputy Clerk/LD

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1091

September Term, 2007
SEC-3-11062r

Filed On:
July 14, 2008

Calvin David Fox,
Petitioner

v.

Securities and Exchange Commission,
Respondent

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: Deputy Clerk/LD

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54840 / November 30, 2006

Admin. Proc. File No. 3-11062

In the Matter of the Application of

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, FL 33468

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

ORDER DENYING REQUEST FOR RECONSIDERATION

On November 30, 2006 we dismissed the appeal of Calvin David Fox from disciplinary action by the New York Stock Exchange, Inc. ("NYSE" or "Exchange") because Fox had failed to file a timely request that the Board of Directors of the NYSE review the hearing panel decision and, consequently, failed to exhaust the remedies provided by the Exchange before appealing to the Commission. 1/ On December 11, 2006, Fox filed a Motion for Reconsideration of the November 30, 2006 Order ("the Order").

Rule of Practice 470 governs our consideration of Fox's motion. 2/ Reconsideration is an extraordinary remedy

1/ Calvin David Fox, Securities Exchange Act Rel. No. 54840 (Nov. 30, 2006), __ SEC Docket ____.

2/ 17 C.F.R. § 201.470.

designed to correct manifest errors of law or fact or permit the introduction of newly discovered evidence. 3/

Fox argues that the Order contains errors of fact and of law and reaches an erroneous conclusion that Fox filed his request for review by the Board of Directors after the time specified by the NYSE rules had expired. For the first time, Fox disputes the factual premise upon which that conclusion is based: that the Exchange mailed the hearing panel decision to Fox on March 31, 2006. He does not, however, introduce newly discovered evidence in support of this claim. Rather, Fox speculates that, because the March 31, 2006 date on the envelope in which the hearing panel decision was mailed is from a postage meter, the NYSE could have stamped it on that date but placed it in the mail on a subsequent date. This speculation, however, is countered by the description given by counsel for the NYSE of the NYSE's settled procedure of mailing letters on the same day that they are stamped by the postage meter. In the absence of evidence that this practice was not followed, we see no reason to disturb our earlier finding that the hearing panel decision was mailed on March 31, 2006.

Before filing this motion for reconsideration, Fox did not contest the date of mailing of the hearing panel decision. Instead, Fox argued that service of the hearing panel decision was not effective until delivery. The Order rejects Fox's service-on-delivery theory as inconsistent with the applicable NYSE rules. Fox reiterates a variation of that legal argument in the instant motion, asserting that service by certified mail is not effective until delivered. Fox offers his interpretation of the Commission's Rules and a definition from Black's Law Dictionary in support of his position. Neither of these is relevant to the

interpretation of the clear language of NYSE Rule 476(d) which states that "[s]ervice shall be deemed effective . . . by leaving [the document] either at the respondent's last known office address.during business hours or respondent's last place of residence as reflected in Exchange records, or upon mailing same to the respondent at the aforesaid office address or place of residence." 4/ We find that neither Fox's factual assertions nor his legal argument provide any reason for reconsidering the November 30, 2006 Order.

Accordingly, IT IS ORDERED that Petitioner's Motion to Reconsider be, and it hereby is, denied.

By the Commission.

Nancy M.
Morris
Secretary

3/ See Philip A. Lehman, Securities Exchange Act Rel. No. 54991 (Dec. 21, 2006) ___ SEC Docket _____ (Order Denying Request for Reconsideration).

4/ NYSE Rule 476(d). Rule 476(e) provides that hearing panel decisions are to be served as provided in Rule 476(d) which applies to service of Charge Memoranda.

SECURITIES EXCHANGE ACT OF 1934

Section 19(d)

(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this title.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory

agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Case No. 07-1091
SEC Case No. 3-11062R

CALVIN DAVID FOX,

Petitoner,

Vs

SECURITES EXCHANGE COMMISSION,

Respondent.
_____/

MOTION FOR REHEARING EN BANC
MOTION FOR REHEARING

COMES NOW, the Petitioner, CALVIN DAVID FOX, as his own counsel in this matter and submits this Motion for Rehearing En Banc and Motion for Rehearing, to wit:

I. RULE 35(B)(1) STATEMENT

1.) The attached opinion of the panel of this Court leaves undisturbed an SEC opinion denying relief, where it is undisputed that the SEC opinion is based upon unauthorized, ex parte communication between the Enforcement Division of the NYSE (Enforcement) and the SEC, which fundamental impropriety conflicts with the decisions of the United States Supreme Court which prohibit ex parte, unauthorized communication whether it is used to deny relief or not. E.g., Liljeberg v. Health Services

Corp., 486 U.S. 847, 860, 865, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)(the rules insure not only the fairness of a proceeding, but that it is not secret nor ex parte); Offut v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954); Aetna Life Insurance v. Lavoie, 475 U.S. 813, at 825, 106 S.Ct. 1580, at 1587, 89 L.Ed.2d 823 (1986); In Re Murchison, 349 U.S. 133, at 136, 75 S.Ct. 623, at 625, 99 L.Ed. 942 (1955).

2.) This Court's panel decision is of exceptional importance in that it uses the wrong standard of review to reject the deficiency in service by mail, concluding that service calculated upon Enforcement's private postal meter mark without requiring proof of receipt was okay, because it was, "*reasonably calculated to apprise the petitioner of his rights*" (A1). The panel decision conflicts directly with the statutory requirement proof of "*receipt*" as service for notices of discipline as mandated by Section 19d Securities Exchange Act of 1934 (A2), which is the statutory authority for the NYSE to act as a Self Regulatory Organization (SRO). Contrary to the requirement of Section 19d, the panel opinion follows Enforcement's restricted interpretation of Rule 476 that "service" by mail does not require "receipt" for proof of service, notwithstanding the express "receipt" requirement in Section 19d. Section 19d specifically requires that an aggrieved party must receive notice of discipline before the time to request review commences. The panel decision instead adopts the restricted NYSE Division of Enforcement interpretation of NYSE Rule 476, which allows service of a notice of discipline as calculated from the inked date on Enforcement's private postal meter mark and not from actual receipt.

The panel opinion is of exceptional importance in that it overrules Section 19d's requirement that

"*receipt*" is required for proof of service of a notice of final discipline and adopts Enforcement's claim that Fox failed to timely "exhaust NYSE remedies," notwithstanding, that after receipt of the notice of discipline on April 6, 2006, Fox timely complied under Section 19d twenty-one (21) days later by demanding review by the NYSE.

The panel decision is of exceptional importance in that it fails to properly interpret NYSE Rule 476 in pari materia with the "*receipt*" requirement of Section 19d of the Securities Exchange Act of 1934, wherein if service is by U.S. mail, service must be by certified mail, Express mail, or registered mail, in order to provide proof of "*receipt*" as service.

3.) The panel decision conflicts with the decision of the Fifth Circuit that private postal meters are not "service" nor evidence of "receipt" in federal proceedings. See, Rotenberry v. Commissioner of Internal Revenue, 847 F.2d 229 (5th Cir. 1988)(in the U.S. Tax Court, mail postmarked by the U.S. Postal Service is the only method of "filing," with the only narrow exception that the Secretary of the Treasury may prescribe regulations for the filing of appeals by private postal meters).

4.) The panel decision involves questions of exceptional importance where the panel leaves undisturbed Enforcement's practice of sending unauthorized, ex parte filings to the SEC, where the SEC relys upon said unauthorized, ex parte filings to deny relief and Rule 470(b) SEC Rules of Practice prohibits said unauthorized filings. The practice of allowing unauthorized ex parte Enforcement filings, which the SEC cites to deny relief herein, is a denial of fundamental due process and creates the appearance that some parties are more favored than others; demeaning the integrity of the federal administrative

and judicial process.

5.) The panel opinion is exceptionally important in that improperly allows the inked date of Enforcement's private postal meter as proof of service, where there is no compliance with USPS certified mailing requirements. The U.S. Postal Office reported herein that it has no record of the Enforcement mailing until six (6) days after the inked date of Enforcement's private postal meter mark.

6.) In the interests of justice, this Court's review of the panel opinion is exceptionally important in that the law of the case has established that: a.) the two claims against Fox are based upon the content of a fifteen (15) minute conversation more than eight years ago, between attorney Fox and attorney Rosa, which Enforcement's witness, Rosa testified at the only evidentiary hearing below he does not remember the conversation with Fox; b.) using the wrong standard of review, this Court's panel sustained the SEC denial of review on the merits, and the SEC opinion was decided upon a prohibited, ex parte document; c.) Enforcement's proof of "service" by mail without receipt is prohibited by Section 19d; d.) Enforcement's Third panel opinion is predicated upon fabricated and falsified findings; e.) Enforcement's Third panel opinion was designated as merely supplemental to the Second panel opinion, which was still on remand to the Board of the NYSE; and f.) the two claims against Fox have been already set aside by the SEC and NYSE Board three (3) times for lack of sufficiency.

II. Statement of the Case

7.) On March 26, 2008 the panel in this cause issued the attached opinion (Appendix at A1) affirming the decision the Securities and Exchange Commission (D163), which sustained the Acting Secretary of the NYSE (D135) dismissing Fox's demand for review of

the Third panel opinion, which is designated as a supplement to the Second panel opinion remanded by the NYSE Board (D127). The NYSE Enforcement Division in its letter requesting dismissal, claimed that Fox had not timely filed his demand for review, where Fox had filed twenty-one (21) days after April 6, 2006, the date of his receipt of the NYSE's Third panel decision. Enforcement claims instead, that the inked date of Enforcement's private postal meter, March 31, 2006, is the date of service by mail and proof of actual receipt is not required for its interpretation of NYSE Rule 476 (D132).

The SEC opinion affirmed the Acting Secretary's dismissal after first ordering Enforcement to produce evidence of Enforcement's service by Certified mail (D163; A2-A4). Fox filed a vigorous Motion for Rehearing pointing out the failure of proof of service (D164). Without any request for a response from the SEC as required by Rule 470(b), Enforcement filed an extensive eight (8) page response on December 19, 2006 and knowingly failed to serve Fox with its response (D165, A16-A23). Enforcement's unauthorized response, was knowingly ex parte and was not provided to Fox until more than a year later by the SEC, on or about January 17, 2008.

Oral argument was not conducted by this Court's panel, although strongly requested by Fox. This cause is solely predicated upon a fifteen (15) minute conversation on January 12, 2000, eight (8) years ago, between Fox, a Florida lawyer, and Joe Rosa, a New York lawyer who left the employment of Prudential Securities [D87, pp. 5-6; T154 "the only relevant evidence"; T203-T206; T209-T210; T211-T213; T214-T216; T217-T218; T416 (unrefuted testimony of Fox)]. Rosa testified at the only evidentiary hearing on May 22, 2002 that he did not remember the content

of the conversation with Fox (D21, T121). Fox's testimony of no wrongdoing was therefore unrefuted (D87, SEC order reversing first NYSE panel). Fox has been unemployed for more than eight years since February 7, 2000 because of this case, except for a temporary part time job for a few months.

This Court's panel used the wrong standard of review to conclude that service by mail was okay, because Fox was, "reasonably apprised of his rights" (A1). The panel failed to consider statutory analysis in reviewing Rule 476. The final authority for consideration of Rule 476 is the enabling statute for the NYSE as an SRO in Section 19d of the Securities Exchange Act of 1934. Fox is not your usual wild-eyed litigant. It may be that Fox's argument based upon a 1934 enabling law is beyond what this Court's panel and the NYSE expects from most litigants. However, the undersigned worked for the Florida Attorney General almost ten (10) years as lead counsel, successfully litigating statutes and rules, relying intimately upon the interpretation and history of legislation, statutes and constitutional provisions. E.g., Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1985)(reversing the U.S. 11th Circuit sitting en banc; establishing the standard for review of ineffective assistance of counsel); Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)(reversing the Florida Third District sitting in the first en banc case in Florida; establishing the standard for drug courier profiles); Chandler v. Florida, 449 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)(overturning fifty (50) years of precedent and establishing the right of the people to view trials through cameras in the courtroom); State v. Allen, 362 So.2d 10 (Fla. 1978)(reversing more than three hundred (300) appellate and trial cases, which had

declared Section 812.014 Fla.Stat., the new Florida "theft statute," unconstitutional). The proper standard of review herein is to examine the historical basis for the grant of authority to the NYSE as an SRO, under Section 19d. It is plainly evident that Enforcement's restricted interpretation of NYSE Rule 476 service by mail, which excludes the statutory requirement of "*receipt*" as an element of proof of service, and was followed by this Court's panel, is completely erroneous should be reheard.

IV. THE PLAIN INTENT AND MEANING OF THE SECURITIES ACT OF 1934 REQUIRES RECEIPT BY THE AGGRIEVED PARTY

8.) The panel opinion, using the wrong standard of review, has relied entirely upon Enforcement's restricted interpretation of NYSE Rule 476(e) for its conclusion that proof of service calculated upon the ink stains of Enforcement's private postal meter, is lawfully sufficient without proof of receipt. The panel has overlooked and failed to consider that NYSE Rule 476 is not the final authority for review of this circumstance. The enabling authority allowing the NYSE to regulate itself as an SRO is Section 19d of the Securities Exchange Act of 1934 (A2), which must be used for any analysis of Rule 476. The panel overlooked and failed to apply the statutory standard that actual receipt of "final discipline," is required by Section 19(d) of the Securities Exchange Act of 1934, which provides inter alia:

> "(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein . . . the self regulatory organization shall promptly file notice thereof . . ."

> "(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine."
>
> [Emphasis added]. A2.

The plain meaning and intent of Section 19(d) of the Securities Exchange Act of 1934, is that Enforcement's Third panel opinion, is the "*final discipline*," from which Fox may seek "*review*," and that the period to demand review commences after service upon Fox, which is specifically defined as receipt by Fox. Under the plain meaning of the words and intent of Section 19d, actual "receipt" by the aggrieved party, Fox, of the third panel opinion, "final discipline," was required as service to commence the period to file a claim for review. Enforcement's claim that Fox's demand for review was not timely, based solely upon the vagaries of Enforcement's private postal meter mark, without proof of receipt, is prohibited on the face of the plain statutory language of Section 19(d). This Court's panel standard of review that Fox was "fairly apprised" is therefore erroneous.

This Court's panel has overlooked that Rule 476 requiring "service" of Charge Memorandums provides for three (3) methods for service:

> "Service shall be deemed effective by [1] personal service of such Charge Memorandum, or [2] by leaving same either at the respondent's last known office address during business hours or respondent's last place of residence as reflected in Exchange records, or [3] upon mailing same to the respondent at the aforesaid office address or place of residence." [Enumeration added].

Where methods "1" and "2," require actual or constructive receipt consistent with Section 19d the third requirement can also be read to comply with Section 19d. This Court's panel has overlooked that Rule 476 read in para materia with Section 19d, requires that service by mail must be by certified mail, Express mail or registered mail in order to show receipt.

This Court's panel opinion following Enforcement's interpretation of Rule 476 must therefore be set aside as unlawful under Section 19d of the Securities Exchange Act of 1934, and not complying with fundamental due process and the plain meaning and intent of the enabling statute. Service of final discipline herein under Section 19d was on April 6, 2006, when the Third panel opinion was received by Fox, and Fox's Petition for review by the NYSE Board was timely, when filed twenty-one (21) days later.

9.) The construction of Rule 476 read in para materia with the requirement of Section 19d for receipt as service is consistent with the constitutional minimum for service. E.g., Rule 141(a)(2) SEC Rules of Practice, "Orders and Decisions: Service of Orders Instituting Proceeding and Other Orders and Decisions—How made." Rule 141(a)(2) provides specifically that "service" is defined as actual delivery.

Delivery is defined:

> "Delivery means—[1] handing a copy of the order to the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or [2] leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or [3] sending a copy of the order addressed to the individual by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt; . . ." [Emphasis and enumeration added].

V. THE THIRD SUPPLEMENTAL OPINION WAS AS PART OF THE PROCESS ALREADY UNDER REVIEW AFTER REMAND AND NO SEPARATE PROCEEDING WAS NECESSARY

10.) In any event, this Court's panel also overlooked that there was no hiatus in the appeal before the NYSE. Enforcement's Third panel opinion was plainly labeled only as a "*supplement*" to the Second Panel opinion, which was already under timely review before the NYSE Board. This Court's panel overlooked that Fox in his brief below and before this Court, repeatedly complained that the Third panel opinion, which was labeled as a "supplement" to the second opinion, was already on remand from the SEC to the NYSE, which had jurisdiction in this matter. This Court's panel has overlooked that the third panel opinion, therefore does not stand alone requiring a new process for review. Murphy, the panel chairman's, letter requiring the beginning of yet another process of review for his corrupt supplemental opinion was mere surplusage and not jurisdictional.

III. THERE WAS NO PROOF OF SERVICE BY CERTIFIED MAIL

11.) This Court's panel has overlooked and failed to distinguish that service by Enforcement's private postal meter with the inked date of March 31, 2006 is insufficient proof of certified mail by the U.S.P.S. When ordered to show proof of service by U.S.P.S. certified mail, Enforcement produced only, a.) the undated and blank "Certified Mail" receipt'; one side of an undated return postal card for Certified Mail; c.) Murphy's March 27, 2006 letter; and the envelope provided by Fox, with Enforcement's private postal meter inked date of Friday, March 31, 2006 (D161-D162). The U.S. Post Office reported that it had no evidence that it had the Murphy opinion in its possession as certified mail prior to Thursday, April 6, 2006 (D164).

12.) The panel has overlooked that private postal meters are not evidence in this federal proceeding of mailing. As specifically provided in the U.S.P.S. Domestic Mailing Manual (DMM); private postal meters are otherwise only evidence that postage has been prepaid. Rule 604.4.1.1 DMM. In the present cause, Enforcement chose to use the United States Postal Service certified mail as the method of "service" by mail. There is no statutory exception allowing service by private postal meter as proof of certified mailing. Compare, Rotenberry v. Commissioner. Under DMM 503.3.3.5d there was no evidence of "when the article was accepted," in that all the certified mailing documents were blank. Therefore there is no lawful evidence of when the Third panel opinion was mailed by certified mail. The only proof of mailing offered by Enforcement was, "we-musta-done-that-because-that's-what-we-done-before," in Enforcement's unauthorized, ex parte Response at the

SEC (D165). The panel overlooked that Enforcement's proof of service by certified mailing was without merit.

14.) This Court's panel overlooked that private postal meters are not evidence of receipt or service. E.g., Lin v. Unemployment Compensation Board, 558 Pa. 94, 735 A.2d 697 (1999)(an appeal with a private meter postage mark is only filed when received; date on private postage meter can be manipulated to any date and is inherently unreliable); Upper Allegheny Authority v. Commonwealth, 130 Pa.Cmwlth. 106, 567 A.2d 342 (1989)(private postal meter date is obviously not equivalent to a "postmark"), Penn Valley Management v. Robertson, 724 S.W.2d 661 (Mo.App. 1987)(private postal meter mark is not equivalent of postmark endorsed by the United States Post Office).

VI. THE SEC RELIED UPON ILLICIT, EX PARTE FILING

15.) This Court's panel has overlooked that the SEC conceded that Enforcement's response to Fox's Motion for Rehearing was not authorized by SEC Rule 470(b) and should have been stricken. Furthermore, the panel has overlooked that Enforcement's response was ex parte and Enforcement knew it was ex parte and that the allegations in its response, were used by the SEC to deny Fox's motion for rehearing (D166, p. 2). The ex parte nature of Enforcement's response is an anathema to any sense of fairness of the SEC proceeding. The applicable standard of fairness upon which the panel should have reversed is expressed Liljeberg v. Health Services Corp., 486 U.S. 847, 860, 865, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), where the Court explained that the intent of the rules to insure the fairness of a proceeding are:

> "[T]o promote public confidence in the integrity of the judicial process" and "to

> promote confidence in the judiciary by avoiding even the appearance of impropriety. . ."[Emphasis added].

Thus, inherent in the requirements for the fundamental fairness of a proceeding is that it is not regarded as secret, biased or ex parte, and that, "our system of justice must satisfy the appearance of justice." [emphasis added], Offut v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954); see, also, Aetna Life Insurance v. Lavoie, 475 U.S. 813, at 825, 106 S.Ct. 1580, at 1587, 89 L.Ed.2d 823 (1986); In Re Murchison, 349 U.S. 133, at 136, 75 S.Ct. 623, at 625, 99 L.Ed. 942 (1955). In this cause, there is a chronic appearance of injustice and impropriety, and a lack of fundamental due process. Most recently, these proceedings were infected by an unauthorized, ex parte response, which Enforcement knew was ex parte and still failed to cause to be lawfully served. Enforcement, which repeatedly has come to these proceedings with dirty hands, now relies upon fabricated evidence in the Third panel opinion. This cause should be reheard upon Section 19d and reversed upon the manifest injustice of this cause.

WHEREFORE, upon the foregoing and such other terms as this Court deems just, the Petitioner, CALVIN DAVID FOX, prays that this Court will grant rehearing and rehearing en banc and reverse the SEC dismissal and cause this matter to be reinstated, the charges dismissed and the Petitioner reinstated with treble back pay, attorneys fees and costs.

CALVIN DAVID FOX
Florida Bar No. 192098
Post Office Box 7900
Jupiter, Florida 33468
(954) 383-5943

D.C. Circuit Case No. 07-1091
Calvin David Fox v. SEC

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SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 48731 / October 31, 2003

Admin. Proc. File No. 3-11062

In the Matter of the Application of

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, FL 33468

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE - -
REVIEW OF DISCIPLINARY PROCEEDINGS

Alleged Conduct Inconsistent with Just and Equitable Principles of Trade

Alleged Misstatement to Member Firm Employer

Alleged Transmission of Altered Court Order to Member Firm Employer

Former registered representative of member firm of New York Stock Exchange, Inc. is alleged to have engaged in conduct inconsistent

with just and equitable principles of trade by making a misstatement to his member firm employer about the status of his license to practice law in the State of Florida and by submitting an altered copy of an order of the Florida Supreme Court to his member firm employer to support the misstatement. Held, proceeding remanded for clarification and explanation of Exchange's findings in support of the allegations.

APPEARANCES:

Calvin David Fox, pro se.

Rex W. Mixon and Steven F. Korostoff, for the New York Stock Exchange, Inc.

Appeal filed: March 7, 2003

Last brief received: August 4, 2003

I.

Calvin David Fox ("Fox"), formerly a registered representative associated with Prudential Securities, Inc. ("Prudential"), a member firm of the New York Stock Exchange, Inc. ("NYSE"), seeks review of NYSE disciplinary action. In May 2002, an NYSE hearing panel found that Fox made a misstatement to Prudential regarding the status of his license to practice law in Florida and, further, that Fox sent an altered copy of a Florida Supreme Court order to Prudential to support the misstatement. The hearing panel found that this conduct was inconsistent with just and equitable principles of trade, in violation of

NYSE Rule 476(a)(6), and censured Fox and barred him for a period of four years from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization. On Fox's appeal, the NYSE Board of Directors issued a decision affirming the decision of the hearing panel in all respects. This appeal followed. 1/ We base our findings on an independent review of the record.

1/ On July 31, 2003, Fox filed with the Commission a "Motion to Strike; and/or Extraordinary Motion for Additional Time," in which Fox claimed that the method by which the NYSE served its opposition brief on Fox was improper. Fox requested that the Commission strike the NYSE opposition brief. Fox also requested that he be granted an additional 14 days to file his reply brief. We deny the motion. The NYSE complied with the Commission's Rules of Practice by serving its brief upon Fox by first class mail. The NYSE served Fox by a different means than it served the Commission, but provided an explanation for doing so in its brief, as required by the Commission's Rules of Practice. See 17 C.F.R. §201.150 cmt (a) (2003). We note that Fox ultimately filed his reply brief timely.

II.

From July 1999 until February 2000, Fox was employed as a registered representative at Prudential in its Lauderhill, Florida office. Prior to working at Prudential, Fox practiced as an attorney in Florida. Fox has not worked in the securities industry in a registered capacity since February 2000, when his employment at Prudential was terminated.

Beginning in September 1996, Fox was the subject of a complaint filed with the Florida Bar by the husband of one of Fox's former legal clients. The complaint alleged that Fox had improperly retained funds in a client trust account. In proceedings related to the complaint, Fox was ordered, in September 1997, in a subpoena issued by a grievance committee of the Florida Bar, to produce, among other things, all financial records of his clients trust accounts. After a number of intervening proceedings, in which a referee found that Fox had failed to comply with the subpoena without good cause, the Florida Supreme Court issued an order on November 24, 1999. That order directed that Fox be suspended from the practice of law, effective 30 days from the date of the order, on December 24, 1999, until such time as Fox complied with the subpoena. The circumstances surrounding Prudential's subsequent inquiry of Fox regarding the suspension order are the focus of the NYSE's allegations against Fox.

On January 11, 2000, Joseph Rosa ("Rosa"), then an in-house attorney in Prudential's New York office, telephoned Fox in his Prudential office in Florida and asked him questions about the status of his license to practice law in Florida. A Florida newspaper article indicating that Fox was suspended had been brought to Rosa's attention. In response to

Rosa's questions during this telephone conversation, Fox stated to Rosa that his license was not then suspended and that his license suspension was stayed pending the Florida Supreme Court's ruling on a motion for rehearing that Fox had filed with the Court earlier that month. Arlene Sankel, chief branch discipline counsel in the Miami office of the Florida Bar, testified before the hearing panel that Fox was suspended at the time of his conversation with Rosa.

At the end of their conversation, Rosa requested that Fox fax to him any materials supporting Fox's claim that his license suspension was stayed. On January 12, 2000, Fox faxed several documents to Rosa, including a copy of his "supplement to Motion for Rehearing, Etc." before the Florida Supreme Court and certain rules of Florida appellate procedure, but not including a copy of the suspension order. On January 13, 2000, Rosa telephoned Fox again and asked Fox to fax him the order.

Fox then faxed to Rosa a copy of the order, in which the final sentence was deleted (the "altered order"). With the deletion, the final sentence of the altered order read, "Not final until time expires to file motion for rehearing and, if filed, determined." the sentence that had been removed from the order, with underlining in the original document, read, "The filing of a motion for rehearing shall not alter the effective date of this suspension."

III.

Fox acknowledges that he told Rosa that he was not suspended. However, Fox asserts, as he did before the NYSE, that his statements to Rosa expressed his sincerely held, good faith legal opinion that his license suspension was stayed while the Court considered his

motion for rehearing. Fox states that this opinion was based on his experience practicing appellate law and his understanding of certain rules of Florida appellate procedure, and was not an intentional misstatement of the status of his license. Although Rosa testified that he did not have a copy of the suspension order at the time he called Fox, Fox testified that he assumed that Rosa had a copy of the order in hand when he first called Fox and, accordingly, was familiar with the language in the order. Fox characterizes his conversation with Rosa as one between two lawyers arguing about the meaning of an order, rather than one involving an affirmative misstatement.

Fox also acknowledges that he faxed the altered order to Rosa. In his defense, Fox claims, as he did before the NYSE, that he accidentally sent Rosa the altered order, which he assertedly had prepared solely with the intention of sending it to his mother and other family members. Over the course of this proceeding, Fox offered two different accounts of his transmission of the altered order: he has represented that he inadvertently detached the altered order from a copy of a letter to his mother and, alternatively, that he accidentally grabbed the altered order from a pile of documents prior to faxing it to Rosa. Notwithstanding this discrepancy, Fox has taken the position throughout this proceeding that his transmission of the altered order does not amount to a violation of NYSE Rule 476(a)(6) because it was accidental and does not involve an act of bad faith or unethical conduct.

IV.

In order to sustain an exchange disciplinary proceeding, we must find, pursuant to Section 19(e) of the Securities Exchange Act of 1934 2/, that the

respondent engaged in the acts in which the NYSE found him to have engaged. With respect to a charge that conduct was inconsistent with just and equitable principles of trade, we have held that a self-regulatory organization need not find that the respondent acted with scienter, but must find that the respondent acted in bad faith or unethically. 3/ In this instance, the NYSE did not make findings with respect to whether Fox acted in bad faith or unethically.

As indicated, Fox has defended his conduct on the ground that his conversation with Rosa was a good faith, back-and-forth argument about the effectiveness of the suspension order. Rosa's testimony did not directly contradict Fox's description of the conversation, and the NYSE hearing panel did not address in its decision whether it found Fox's explanation credible. Instead, the NYSE simply said of the alleged misstatement, "This [statement that his suspension was stayed pending a motion before the court] may have been Fox's opinion but it was not true." Fox also has characterized his transmission of the altered order as an accident and not a bad faith or unethical act. In its findings of fact, the NYSE hearing panel observed that Fox had offered different explanations for the transmission of the altered order, but the panel did not address whether it found that Fox acted in bad faith or unethically in sending the altered order. Instead, the panel declared that Fox was responsible for the transmission of the altered order, simply because it was in his possession and control.

The Commission cannot properly complete its review function in this matter until the NYSE has provided the Commission with clarification and further explanation of the basis of its finding that Fox's conduct was inconsistent with just and equitable

principles of trade. We therefore remand this matter. On remand, in light of Commission precedent requiring a finding of bad faith or unethical conduct in proceedings arising from alleged conduct inconsistent with just and equitable principles of trade, the NYSE should expressly consider whether Fox acted in bad faith or unethically when he made his statement to Rosa that his suspension was stayed and/or sent the altered order, and, if it finds that Fox did so, provide the specific basis upon which it makes such a determination. We do not intend to suggest any view as to the outcome.

An appropriate order will issue. 4/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS).

Jonathan G. Katz
Secretary

BY: Jill M. Peterson
Assistant Secretary

2/ 15 U.S.C. § 78s(e). We also must find that the acts were in violation of the provisions of the Exchange Act, the rules or regulations thereunder, or the rules of the NYSE as have been specified in the determination of the NYSE and that such provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.

3/ See, e.g., Robert E. Kauffman, 51 S.E.C. 838, 839-40 (1993) (stating that violation of NASD rule prohibiting conduct inconsistent with just and equitable principles of trade against

registered representative for misstatement of educational background does not require finding that respondent acted with scienter, but does require finding of bad faith or unethical conduct), aff'd, 40 F.3d 1240 (3d Cir. 1994) (Table); Robert J. Jautz, 48 S.E.C. 702, 704 (1987) (holding that breach of contract by registered representative of member firm violates NASD rule prohibiting conduct inconsistent with just and equitable principles of trade only if committed in bad faith or accompanied by unethical conduct).

4/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

CASE NO. 3-11062

NYSE Case No. 02-110

CALVIN DAVID FOX,

Appellant,

vs.

NEW YORK STOCK EXCHANGE,

Appellee.

_____/

NOTICE OF APPEAL AFTER REMAND

COMES NOW, the Appellant, CALVIN DAVID FOX, out of an abundance of caution and submits this Notice of Appeal and hereby takes and enters his appeal from the attached Decision of the Board of the New York Stock Exchange on remand, which was entered on April 7, 2005, after reviewing the panel decision on remand in Case No. 02-110. Said decision purports to find the panel decision sufficient, but then reverses the panel a second time to make further findings. All parties take notice of this appeal.

CALVIN DAVID FOX

NYSE Regulation

Vincent F. Murphy
Hearing Officer
Hearing Board

March 31, 2006

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
AND REGULAR MAIL

Mr. Calvin David Fox
PO Box 7900
Jupiter, FL 33458

In re: Calvin David Fox

Dear Mr. Fox:

Enclosed is a copy of the decision rendered by a Hearing Panel with regard to the Remand from the Board of Directors.

If you have been aggrieved by this decision, you may, pursuant to Exchange Rule 476, a copy of which is enclosed, request a review of the determination and/or penalty within 25 days from the date of this letter. You should be aware that a review may also be requested by any member of the Board of Directors or by any others designated in Exchange Rule 476 and/or by the Division of Enforcement. After the 25-day review period, a subsequent letter will advise you of the penalty starting date and/or the fine payment date.

Enclosed, for your information, is a copy of Section 19(d) of the Securities Exchange Act of 1934 regarding the question of SEC review. Failure to exhaust your administrative review rights at the Exchange may affect your right to SEC review.

The Exchange will make such public announcement concerning this disciplinary action as it may deem appropriate.

If you have any questions, please contact Robert H. Keller, Counsel to the Hearing Board, at 212.565.4920.

Very truly yours,

[NO SIGNATURE BLOCK;
ILLEGIBLE SIGNATURE].

Enclosure

cc: Steven F. Korostoff, Esq. - Enforcement Director
Steven M. Tanner, Esq. - Trial Counsel

CALVIN DAVID FOX
POST OFFICE BOX 7900
JUPITER, FLORIDA 33468
(954) 383-5943

APRIL 27, 2006

Mary Yeager
Acting Secretary
New York Stock Exchange
11 Wall Street Suite 609
New York, New York 10005

EXCERPT

RE: Demand for Review of Exchange Panel Decision 02-110 and two more panel decisions after two remands.

Dear Ms. Yeager:

Under Rule 476(g) this letter shall constitute my demand for review of Panel Decision 02-110, which was modified upon remand from Securities Exchange Case No. 3-11062 and which was again remanded after a hearing before the NYSE Board, which was again modified on March 27, 2006 and received by the undersigned by letter from the NYSE dated March 31, 2006.

On both remands the panel took no additional evidence and accepted no additional testimony. This case is therefore traveling upon the same evidentiary findings as first panel decision and the same evidence as presented at the hearing on May 21, and 22, 2002.

PREFACE: This dispute relates to a single conversation on January 11, 2000 between the undersigned and JOE ROSA, which ROSA testified he did not remember the details of. The Florida Supreme

Court's order and the discussion by Rosa and the undersigned about whether the Florida Supreme Court's November 24, 1999 order was final, was resolved six (6) weeks later on February 22, 2000, when the Florida Supreme Court denied rehearing of its November 24, 1999 order and the order was then final. The errors below are numerous as reflected in three (3) panel attempts and failures to get it right in the Panel's blind zeal to protect Prudential:

1.) The Panel effort to punish the undersigned is moot inasmuch as the punishment recommended by the Panel of four (4) years suspension has . . .

BEFORE THE BOARD OF DIRECTORS OF THE NEW YORK STOCK EXCHANGE

FIRST, SECOND AND THIRD PANEL DECISION NO. 02-110

CALVIN DAVID FOX,
Petitioner,

vs.

DIVISION OF ENFORCEMENT,
of the New York Stock Exchange,
Respondent.
_____/

RESPONSE TO ENFORCEMENT DIVISION LETTER DATED MAY 2, 2006

COMES NOW, the Petitioner, CALVIN DAVID FOX, and submits this Response to Enforcement Division Letter Dated May 2, 2006, to wit:

1.) That on May 3, 2006 the Petitioner received a letter dated May 2, 2006 from Steven M. Tanner of the New York Stock Exchange Division of Enforcement, in which Tanner requests that the Board summarily deny the Petitioner's (Third) Request for Review. It was not received by facsimile.

2.) Tanner contends that the Petitioner's (Third) Request for Review was made on April 27, 2006 and therefore was more than twenty-five (25) days after service upon the Petitioner of the third opinion of the panel, which bears a date of March 27, 2006.

3.) Tanner's request to summarily deny review is in bad faith and utterly without any merit inasmuch as the Petitioner's request was timely; and in any

event, this matter is still on review from the remand from the SEC to the Board, and review by the Board is incomplete.

THE PETITION'S REQUEST WAS TIMELY

4.) The Rule, which this Board is quite familiar with, provides that review should be requested, "within twenty-five days after notice of the determination . . . is served upon the respondent" [Emphasis added]. Rule 476(g) para. 6. Any Member of the Board may also request review.

5.) Service in the custom and practice of the NYSE and administrative law, is when the respondent actually is served with the notice by certified mail, facsimile or process.

6.) That in the present circumstance, the Petitioner was served by certified mail not earlier than April 6, 2006 as reflected by the green card receipt, which was signed by the Petitioner at the time of service and the certified mail envelope containing the third panel decision. Exhibit A.

7.) Therefore the Petitioner's Request for Review made twenty-one (21) days after service of the Third panel opinion on April 27, 2006, was made well within the twenty-five (25) days allowed.

8.) The Division of Enforcement request for summary denial is specious and again, a gross waste of time for this Board and the Petitioner.

DIVISION OF ENFORCEMENT'S REQUEST IS FRIVOLOUS WHERE THIS MATTER IS STILL ON REVIEW FROM THE ORIGINAL SEC REMAND

9.) The Petitioner filed an appeal to the SEC from this Board's opinion on April 7, 2005, which remanded this matter back a second time to the panel

for yet more findings.

10.) The Division of Enforcement opposed the Petitioner's appeal to the SEC, upon the ground that the review by the Board of the NYSE was still going on, notwithstanding the April 7, 2005 opinion.

11.) Because of the Division of Enforcement's position, the SEC sent this matter back to the Board until its review on remand from the SEC was completed.

12.) That this matter is still traveling upon the remand from the SEC and the previous Requests for Review made by the Petitioner.

13.) The Division of Enforcement request for summary rejection of the Petitioner's Request for Review is made in bad faith and to avoid a determination by the Board upon the merits of this matter.

BAD FAITH OF PRUDENTIAL

14.) That the only bad faith, which is manifested on this record is the bad faith of Prudential in abruptly ceasing all communication with its employee instead of resolving any question herein in a matter of minutes. What the record manifests is Prudential's failure to act in a businesslike and good faith fashion with its own employee.

15.) That the only bad faith herein is Prudential's attempt to seize upon this fortuitous opportunity to seize the Petitioner's valuable clients and to silence the Petitioner, who was complaining about Prudential's money laundering and Prudential's payoffs of six figures to money laundering participants in order to conceal Prudential's money laundering.

16.) That this matter has been languishing for six (6) years upon a recommendation of a four year

suspension. The Petitioner has been unemployed since February 7, 2000 and has experienced a severe decline in health as a consequence of this circumstance.

WHEREFORE, the Petitioner, CALVIN DAVID FOX, prays that this Board will deny the Division of Enforcement's bad faith request and that this Board will reject the panel decisions and reinstate the Petitioner with back pay, benefits and such further relief as is appropriate; and further, that this Board will cause its investigation of Prudential's money laundering and impose fines, sanctions and other penalties upon Prudential and its agents.

CALVIN DAVID FOX
PO Box 7900
Jupiter, Florida
33468-7900
(954) 383-5943

EXHIBIT A


NYSE
CERTIFIED MAIL
NAME 4/2
1ST NOTICE
2ND NOTICE
RETURN 4/21
Mr. Calvin David Fox
PO Box 7900
Jupiter, FL 33459
Private Postal meter

BEFORE THE BOARD OF DIRECTORS OF THE
NEW YORK STOCK EXCHANGE

FIRST, SECOND AND THIRD PANEL DECISION
NO. 02-110

CALVIN DAVID FOX,
Petitioner,

vs.

DIVISION OF ENFORCEMENT,
of the New York Stock Exchange,
Respondent.
_____/

RENEWAL OF NOTICE OF APPEAL AFTER REMAND FROM SEC

COMES NOW, the Appellant, CALVIN DAVID FOX, and submits this Renewal of the attached Notice of Appeal filed on May 5, 2005 and supporting documents and hereby re-enters his appeal from the attached Decision of the Board of the New York Stock Exchange on remand, which was entered on April 7, 2005 and supplemented by the opinion of the panel on remand dated March 27, 2006, which the Acting Secretary says was final on April 25, 2006. Said decision of the NYSE affirms and upholds the September 10, 2004 panel decision on remand attached hereto, as supplemented by the panel's decision of March 27, 2006 attached hereto.

CALVIN DAVID FOX
PO Box 7900
Jupiter, Florida 33468
(954) 383-5943

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11062r

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 28, 2006

In the Matter of the Application of

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, FL 33468

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

ORDER REQUIRING PRODUCTION OF EVIDENCE

On March 27, 2006 a Hearing Panel of the New York Stock Exchange, Inc. ("the Exchange") issued a decision on remand in this matter ("the March 27 decision"). Stock Exchange Rule 476 specifies the permissible methods of service of such decisions. The opposition brief filed with the Commission by the Exchange on September 1, 2006 states that Petitioner Calvin David Fox "was served on March 31, 2006, when the [March 27 decision] was mailed to him." Although the record before the Commission includes a letter dated March 31, 2006 transmitting the March 27 decision that states the letter was sent by certified mail, return receipt requested and by "regular mail," the record does not include evidence of when service was effected.

Accordingly, IT IS ORDERED that New York Stock Exchange, Inc., file with the Office of the Secretary evidence it relies on to establish the date on which Petitioner was served with the March 27, 2006, hearing panel decision pursuant to New York Stock Exchange Rule 476 within ten days of the date of this order.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Nancy M.
Morris
Secretary

UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND
EXCHANGE COMMISSION

ADMINISTRATIVE
PROCEEDINGS
FILE NO. 3-11062r

IN THE MATTER OF THE APPLICATION
OF CALVIN DAVID FOX
PO Box 7900
Jupiter, Florida 33468-7900

_____/

REPLY TO ENFORCEMENT LETTER DATED OCTOBER 4, 2006 FILED IN RESPONSE TO COMMISSION'S ORDER

COMES NOW, the Petitioner, CALVIN DAVID FOX, and submits this Reply to NYSE letter dated October 4, 2006, to wit:

1.) That on October 10, 2006, the undersigned received the response of Enforcement to the Commission's order dated September 28, 2006. In said Commission order, the Commission recites that the record, "does not include evidence of when service was effected." The Commission orders Enforcement to provide all evidence of when service was effected.

2.) That in response to the Commission's order, Enforcement has provided an undated "Certified Mail Receipt," which has no address; and one side of the return of service provided by the U.S. Postal Service for certified mail, which is also undated.

3.) Then, ignoring the Commission's order Enforcement again argues that the Murphy letter

dated March 27, 2006 is proof of service and that a private, identified postal mark on an envelope, which Fox had provided to show that he did not receive the Murphy letter prior to April 6, 2006, the first date the U.S. Post Office notified him of the Murphy letter.

4.) In compliance with the Commissions' order, Enforcement should have provided the other side of the proof of service, which may have the date upon which Fox was served with the Murphy letter and decision.

5.) However, with the "article number" 70033110000210446349, Fox retrieved the attached report of service from the site, USPS.com [evidence, which Enforcement should have provided in compliance with the Commission's order], that Fox was served with the Murphy decision on April 6, 2006. Exhibit A, attached hereto.

6.) Ipso facto, Fox's appeal to the Board of the NYSE was therefore timely and the efforts of Enforcement to block further review by the full Board of the new NYSE, completely erroneous.

WHEREFORE, upon the foregoing and such other terms as the Commission deems just, the Petitioner prays that the Commission will reverse this cause and order Petitioner reinstated with back pay and/or that the Commission will vacate the present erroneous decision of the Acting Secretary and allow this matter to be reviewed by the Board of the NYSE.

CALVIN DAVID FOX
PO Box 7900
Jupiter, Florida 33458
(954) 383-5943

foxfireforty7

From: "Support@USPS"
<uspshelpdesk@spemail.esecurecare.net>
To: <foxfireforty7@bellsouth.net>
Sent: Saturday, December 02, 2006 11:18 PM
Subject: I need to know when certified mail no. 7003 3110 0002 1044 6349 was received ...[Incident: 061201-001042]

SUBJECT

I need to know when certified mail no. 7003 3110 0002 1044 6349 was received by the U.S.P.S.*

Discussion Thread

Response (Karen L) - 12/02/2006 09:18 PM
Dear CALVIN FOX,

Thank you for visiting our website. I understand you are inquiring about the arrival of item number 7003 3110 0002 1044 6349.

Our system shows your item was delivered at 12:56 PM on April 6, 2006 in JUPITER, FL 33458.

I do not have information on when this item was mailed. If Certified Mail items are not taken to the counter, a Certificate of Mailing is not issued. I apologize I cannot be of help on this matter.

If I can be of assistance to you in the future, please feel free to contact me. Thank you for using the United States Postal Service.

Regards,

Karen L
Customer (CALVIN FOX) - 12/01/2006 09:58 AM
I need to know when certified mail no. 7003 3110 0002 1044 6349 was received by the USPS.

As our customer, your privacy is important to us. Please see our privacy policy at www.usps.com
-[—001:000912:14889—]

UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND
EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS
FILE NO. 3-11062R

IN THE MATTER OF THE APPLICATION
OF CALVIN DAVID FOX,
P.O. Box 7900
Jupiter, Florida 33468-7900

_____/

MOTION TO RECONSIDER

COMES NOW, the Petitioner, CALVIN DAVID FOX, and submits this Motion to Reconsider under Rule 470 Rules of Practice, to wit:

1.) That on December 4, 2006 the Petitioner was served by Certified Mail by actual receipt from a Postal Employee with the Commission's decision dismissing the appeal herein. A partial but incomplete facsimile transmission was attempted on November 30, 2006, with an additional page on December 1, 2006. Service was also made by Certified Mail as prescribed in SEC Rule 141(b), entitled, "Service of Orders and Decisions Other Than an Order Instituting Proceedings." "Service" of the Commission's Order was not made under Rule 150 entitled, Service of Papers by Parties," although Rule 150(c)1 to 3 apply requiring actual delivery as proof of service, since the service was by Certified mail and not just "mail." See, Rule 150(d) "When Service is Complete."

2.) The Commission's dismissal is based entirely upon the party, NYSE Enforcement's, claim that the Murphy letter and Third NYSE Hearing Board decision, was "served" by Certified Mail on Friday, March 31, 2006 because of a NYSE postage meter mark. The NYSE Hearing Board offices were closed on Saturday April 1 and Sunday, April 2, 2006.

I. THERE IS NO PROOF OF SERVICE BY MAIL ON MARCH 31, 2006 and ACTUALLY DELIVERY REQUIRED FOR CERTIFIED MAILING:

Most respectfully, the Commission's order of dismissal is mistakenly predicated upon the false conclusion that NYSE Enforcement, has presented proof service on Friday, March 31, 2006, by Certified Mail, which was the chosen method of service by mail by the NYSE Hearing Board. As reflected in this Commission's own Rule 150(d) when special delivery methods are chosen instead of just mailing, actually delivery is required for proof of service. Moreover, in this cause, the presentation to the Postal service required was just as likely, Monday April 3, 2006, or later, where there is no proof of USPS Certified Mail on any particular date.

On September 28, 2006 reciting that "the record does not include evidence of when service was effected," the Commission ordered the NYSE Enforcement Division ("Enforcement"---which is the "Party" across the table from your Petitioner throughout all proceedings below and whose Motion to Dismiss was granted below), to file within ten (10) days: "evidence [Enforcement] relies on to establish the date on which Petitioner was served with the March 27, 2006 hearing panel decision."

In response to the Commission's order, Enforcement produced, a.) an undated and blank "Certified Mail Receipt"; b.) one side of a undated

return postal card for Certified Mail; c.) Murphy's March 27, 2006 letter; and d.) an envelope provided by Fox, which has a NYSE postal meter mark dated Friday, March 31, 2006.

In response, Fox produced the United States Postal Service (USPS) record, that the USPS only evidence of "service" was dated April 6, 2006, when USPS served Fox with Murphy's letter and the Third Hearing Panel opinion).

A.) COMMISSION OVERLOOKS NYSE RULES ON SERVICE

The only evidence presented to the Commission demonstrates only that the Murphy letter dated March 27, 2006 and Third Hearing Panel opinion, were eventually prepared and put in an NYSE envelope with a NYSE postage meter mark, dated Friday, March 31, 2006. Enforcement has presented no evidence of the date of service by Certified Mailing, which was the NYSE Hearing Board's choice for service by mail.

In dismissing this appeal, the Commission has therefore overlooked and failed to consider that there was no evidence as required under NYSE's own Hearing Board rules below that the Third Panel decision was "served" by mail:

For purposes of this discussion, "service" by a party and "service" of orders and decisions are treated as the same thing and we assume as did the Commission in its order, that there are no separate rules or constitutional requirements for service of orders and decision, as compared to "service" by a party. Sub judice, the NYSE document, "Outline: Hearing Board Procedures," recites the methods for service of charge memorandums by NYSE Enforcement and specifically describes the

requirements of proof of service by mail:

> "Mail service is complete when the Charge Memorandum is deposited in a United States Postal Service [USPS] mail depository or is given to an authorized employee of the Postal Service. The date on which this event occurs is considered the date of service." [Emphasis added].

NYSE Outline of Hearing Board Procedures, p.3-4 [Exhibit A, excerpt appended hereto].

In the present cause, the NYSE hearing Board chose Certified Mail as the method of service by mail. It is therefore be bound by the rules for special mailings and service. See, Rule 150(d) SEC Rules of Practice (Any special mailing or delivery—as opposed to just "service by mail"··· requires actual delivery as proof of service).

B.) THERE IS NO EVIDENCE THAT MURPHY'S LETTER WAS RECEIVED BY A USPS EMPLOYEE OR DEPOSITED IN A USPS DEPOSITORY ON MARCH 31, 2006:

Rule 503.3.3.5 entitled "Procedure" at (a) of the USPS Domestic Mail Manual (November 9, 2006) (DMM) provides that to mail by Certified Mail, the mailer must specifically enter the name and address of the person to whom the Certified Mail is addressed on the Certified Mail Receipt, Form 3800:

> "Procedure
> A mailer of Certified Mail must:
> a. Enter on Form 3800 the name and complete address of the person or firm to whom the mail

is addressed." [Emphasis added].

The reason for providing the complete address on the Certified Mail Receipt is specifically proof of mailing: the postal employee "round-dates" the receipt, showing proof of, "when the article was [given to the postal employee]" :

> "If a postmarked sender's receipt is requested, attach the Certified Mail sticker to the address side of the article and present the article and the completed receipt to the USPS employee, who then round - Dates the receipt to show when the article was accepted." [Emphasis Added].
>
> DMM 503.3.3.5d.

In the present cause, Murphy failed to put the address of Fox on the Certified Mailing receipt. Therefore the staff of the Hearing Board never presented this matter to a Postal Employee and never got a round-dated receipt, showing the date upon which the USPS employee accepted the Certified Mail. There is no proof of Certified Mailing by the NYSE. Indeed, the USPS in this cause has certified that there is no evidence that the USPS ever had the Murphy letter and Third Panel opinion in its possession for mailing before April 6, 2006, when it was served by USPS on Fox:

> "I do not have information on when this item was mailed. If Certified Mail items are not taken to the counter, a Certificate of Mailing is not issued."
>
> USPS E-MAIL REPORT ON
> tem No. 7003 3110 002 1044 6349
> [Exhibit B, attached hereto].

Therefore, Enforcement has provided no evidence nor proof that on Friday March 31 2006 nor any specific time thereafter, that the Murphy letter and Third Hearing Board decision were presented to a USPS employee as lawfully evidence and proof of mailing as required under the NYSE Hearing Board Rules, supra.

C.) POSTAGE METERS ARE NOT PROOF OF MAILING

Fox contends that because the NYSE chose a special mailing, at a minimum the proof of service by Certified Mailing must be by the rules for Certified Mail and, further, that actual delivery as proof of service is required for special mailing and delivery as specified, for example, in Rule 150(d) SEC Rules of Practice. However, Fox's father, who served more than thirty (30) years in the Postal Service, would tell this Commission that Postal meters are not evidence of mailing (documentation has been requested, but is not available for this Motion). This is an elemental concept, which is held in all USPS and Agency practice: postal meters are only evidence that postage has been prepaid. USPS rules make that clear:

> "Postage Meters; and PC Postage Products ("Postage Evidencing Systems")
> **4.1 Basic Information**
> **4.1.1 Definitions**
> "Postage meters and PC Postage products are collectively identified as "postage evidencing systems." A postage evidencing system is a device or system of components a customer uses to print evidence that postage required for mailing has been paid."
>
> Rule 604.4.1.1 DMM.

Thus in the present cause, the NYSE postage meter mark on the envelope provided by Enforcement is not proof of mailing. Under USPS regulations and agency practice, it is only proof that the NYSE Hearing Board prepaid the postage. The only evidence of service by mail, that the USPS accepts that the USPS had the Murphy letter and Third Panel opinion in its mail system, is Thursday, April 6, 2006, when Fox was served by the USPS. To otherwise make the critical determination affecting Fox's right of review, as a matter of law and fact, the Commission must speculate as to when the NYSE actually put the mailing in a USPS mail depository. Moreover, the service by mail method chosen by the NYSE hearing Board was Certified Mail. Proof of Certified Mailing is fatally defective herein, where there is no "round-dated" receipt and therefore the date of mailing cannot be shown by the evidence produced under the Commissions' order to the NYSE.

Finally, Fox would reiterate as contemplated by the NYSE rules of service and the SEC's own Rule 150(d), when service is attempted by other than just "mail" as in the case at bar, actual delivery is required for proof of service. Rule 150(d) SEC Rules of Practice.

II. RULES FOR "SERVICE" BY PARTIES AND "SERVICE" OF ORDERS AND DECISIONS ARE NOT THE SAME

In this case, the parties across the table from each other have always been, as they are before this Commission: Fox and the Enforcement Division of the NYSE. This fiction, however inappropriate, has been maintained throughout these proceedings. The Commission's order of dismissal fails to consider that distinction which is critical to the issue of "service" herein. Here the NYSE Board of Directors has been

denied the opportunity to review this matter, through the maligned efforts of the Division of Enforcement to cover fraudulent findings in the Third panel opinion, which have no basis in the record and evidence. This is not a proceeding between the NYSE and Fox as parties. The service of process complained of herein was not by a party. The service of process complained of herein was the service of an order or decision by a designee of the NYSE Board of Directors. The NYSE Board of Directors was thereafter not allowed by NYSE Enforcement to review the fraudulently based decision of the Murphy hearing Board.

The Commission's order of dismissal is therefore mistakenly drawn upon the assumption that "service" by a party and "service" of orders and decisions are governed by the same rules and constitutional requirements. To the contrary, service of orders and decisions are different than just service by parties. E.g., Rule 141 SEC Rules of Practice, "Orders and Decisions: Service of Orders Instituting Proceedings and Other Orders and Decisions,"; Rule 150 SEC Rules of Practice "Service of Papers by Parties." The NYSE rules are similarly divided, because service of orders and decisions are governed by the recipient's right to due process and equal treatment (equal protection). Thus, any ruling or rule, which allows a NYSE postage meter stamp to serve as proof of a Certified Mailing on the date provided by the postage meter, is a denial of due process and a patent denial of equal treatment and equal protection. Fox, like all members of his class: recipients of orders and decisions, is just as equal as other members of his class. Fox is entitled to the same rights and equal treatment as those recipients, to wit: actual service of orders and decisions. If a recipient has secreted himself and avoided service, constructive service may

be constitutionally allowed, However, in this cause, there has been no showing at any time that Fox has secreted his whereabouts and is unavailable. Therefore, constructive service of process (other than proof of actual delivery of orders and decisions) is a reckless denial of due process and equal protection. Fox is just as equal and has the same rights as any litigant to actual receipt of orders and decisions, where his rights to review are affected by the receipt of orders and decisions.

Furthermore, in the present cause, Murphy's letter, which is dated March 27, 2006, erroneously provides that Fox must seek review twenty five (25) days from the date of Murphy's letter. This is false and defective Notice to Fox of his rights and contrary to the plain language of Rule 476 of the NYSE. Moreover, the only enclosure with Murphy's letter, which was received by Fox on April 6, 2006, was the Third Panel opinion. None of the enclosures referred to in Murphy's letter were included. A second mailing received several days later, failed to include Murphy's letter and instead had the Third Panel Decision and an excerpt of NYSE Rule 476 enclosed. The incompetent mailing to Fox is indicative that the Murphy letter and Third Panel opinion with a NYSE postal meter date of March 31, 2006, was not put in a USPS depository on Friday March 31, 2006. It is just as likely that Murphy's letter and the Third Panel opinion was not put in a USPS depository (with or without its blank Certified Mail form) until Monday, April 3, 2006 or later.

Black's Law Dictionary (Sixth Ed. 1990) specifically defines the legal minimum for "service" of decisions and orders affecting a litigant's rights to review and due process, as in the case at bar, thus:

"Service of process. The service of writs,

> complaints, summons, etc., signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left; and, when they are so delivered, they are then said to have been served." [Emphasis added]
>
> Id., p 1368.

In the present cause, Fox's legal and constitutional rights have been denied. Finally, this cause is the "exceptional" cause contemplated by the Commission's own rules allowing the Commission to proceed herein, even if it is still determined that this cause is a late appeal.

WHEREFORE, upon the foregoing, the Petitioner, CALVIN DAVID FOX, prays that this Commission will reconsider and rehear its order of dismissal and that the Commission will deny dismissal, reject the panel decisions and reinstate the Petitioner with back pay, benefits and such further relief as is appropriate; and that this Board will cause investigation of Prudential's money laundering and impose fines, sanctions and penalties.

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, Florida
33468-7900
(954) 383-5943

EXHIBIT A

[Excerpt]: NYSE HEARING BOARD PROCEDURES

. . . . Mail service is completed when the Charge Memorandum is deposited in a United States Postal Service mail depository or is given to an authorized employee of the Postal Service. The date on which this event occurs is considered the date of service. . . .

Rules of Practice
and
Rules on Fair Fund and Disgorgement Plans

U.S. Securities and Exchange Commission

January 2006

EXCERPT

Rule 470. Reconsideration.

(b) *Procedure*. . . . No response to a motion for reconsideration shall be filed unless requested by the Commission. Any response so requested shall comply with Rule 154.

NYSE RESPONSE TO FOX'S MOTION FOR REHEARING

[This document has never been served upon Fox by either SEC counsel nor NYSE counsel and has not been made available to Fox for this Appendix]

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of CALVIN DAVID FOX P.O. Box 7900 Jupiter, FL 33468 For Review of Disciplinary Action Taken by the New York Stock Exchange, Inc.	ADMINISTRATIV E PROCEEDING FILE NO. 3-11062r

OPPOSITION TO MOTION TO RECONSIDER
PRELIMINARY STATEMENT

NYSE Regulation, Inc. ("NYSE Regulation") submits this Opposition To Respondent's Motion To Reconsider to the Securities and Exchange Commission (the "SEC") in opposition to the Motion to Reconsider filed by Calvin David Fox ("Fox") (the "Motion"), and in support the SEC's Order Dismissing Appeal (the "Order") dated November 30, 2006.

The Order dismissed Fox's appeal to the SEC of disciplinary action taken against him by the New York Stock Exchange, Inc. (The "NYSE"), in which an NYSE Hearing Panel has repeatedly and unanimously determined, and the Board of Directors of the NYSE has twice affirmed, based upon the findings of fact and evidence in the record, that Fox engaged in conduct

inconsistent with just and equitable principles of trade by making a misstatement to his member firm employer regarding the status of the suspension of his license to practice law, and by submitting to his member firm employer an altered official court document to support his misstatement regarding the status of the suspension of his license to practice law. The NYSE imposed upon Fox a sanction of a censure and a four-year bar for the above conduct.

The Order dismissed Fox's appeal to the SEC based on Fox's failure to exhaust his remedies at the NYSE.

For all the reasons set forth below, NYSE Regulation urges that Fox's Motion for Reconsideration be denied.

FOX FAILED TO EXHAUST HIS REMEDIES AT THE NYSE IN A TIMELY MANNER, AND FOX'S MOTION TO RECONSIDER SHOULD THEREFORE BE DENIED

Fox was served with a copy of the Decision On Remand From Board Of Directors (the "Decision") by letter dated March 31, 2006 from the NYSE Hearing Board (the "March 31 Letter"). The March 31 Letter advised Fox that he may "request a review of the determination and/or penalty within 25 days" from the date of the letter, and further stated that after the 25-day review period, a subsequent letter would advise him of the penalty starting date. (NYSE Index to the Record filed by NYSE Group, Inc., ["NYSE Index"] document #40, page 0756).

Thus, Fox had until April 25, 2006, to request a review of the decision. However, it was not until April 27, 2006 that Fox filed with the NYSE Board of Directors a "Demand for Review of Exchange Panel

Decision 02-110 and two more panel decisions after two remands" (the "Demand for Review," NYSE Index document #41, 42, p. 0762, 0774). The Demand for Review was filed with the NYSE two days after the expiration of the review period, and Fox had neither requested nor was granted any extension to file a request for review. Significantly, Fox's Demand for Review was not only received on April 27, 2006, but also was not even dated until April 27, 2006, two days after the expiration of the review period.

As he did in his brief that Fox submitted to the SEC on or about August 4, 2006, when he actually received the Decision (Motion p. 10-12). However, NYSE rules are clear that he was served on March 31, 2006, the date that the Decision On Remand From Board Of Directors was mailed to him.

As found in the Order, NYSE Rule 476(e) states, in pertinent part, that a hearing panel decision become final twenty-five days after "notice thereof has been served upon the respondent in the manner provided in [Rule 476] paragraph (d) . . ." NYSE Rule 476(f) provides that a request for review by the NYSE Board of Directors shall be made by filing a written request within twenty-five days after notice of the hearing panel decision is served upon the respondent. NYSE Rule 476(d) provides that "[s]ervice shall be deemed effective . . . upon mailing . . . to the respondent at [respondent's last known office address] or place of residence." (Order p.2). Thus, as found in the Order, and as dictated by NYSE Rule 476, notice of the Hearing Panel Decision was served on Fox on March 31, 2006, and the twenty-five day time limit began to run on that date.

Moreover, as found in the Order, the March 31 Letter specifically informed Fox that if he was aggrieved by the Hearing Panel Decision, he could,

"pursuant to Exchange Rule 476 . . . request a review of the determination and/or penalty *within 25 days of the date of this letter.*" (Order p. 2, emphasis added). Thus, not only are the NYSE rules clear that the time to file an appeal with the NYSE Board of Directors begins to run on the date of mailing, but the March 31 Letter expressly informed Fox that the 25 day period commenced on the date of the letter.

Indeed, in the Motion Fox concedes that pursuant to the NYSE Hearing Board procedures: "[m]ail service is complete when the Charge Memorandum is deposited in a United States Postal Service . . . depository . . . <u>The date on which this event occurs is considered the date of service.</u>" (Motion p. 4, emphasis in original). Thus, it strains all bounds of reason and credibility how Fox can both argue that the date of service is the date of mailing (Motion p. 4), yet also argue that the date of service is the date that it was received by him. (Motion p. 2, 10)

Moreover, Fox claims that the Order "is based entirely upon the . . . claim that . . . the Murphy letter and Third NYSE Hearing Board decision, was 'served' by Certified Mail on <u>Friday, March 31, 2006</u> . . ." (Motion p. 2, emphasis in original). However, as the Order makes clear, the Order is based on much more that Fox's groundless and unsupported allegations that the March 31 Letter was not mailed on that date. As found in the Order:

> Given the clarity of the governing NYSE rule, the notice given to Fox in the plainest possible terms in the March 31, 2006 letter itself, and the ample time between Fox's April 6 receipt of the March 31 letter and Hearing Panel Decision and the due date of April 25, overlooking his late filing would be

inappropriate. (Order p. 3)

Thus, the Order is based not just on the mailing date, but also on 1) the clear language of the March 31 Letter that Fox had 25 days from the date of the letter to file his appeal, and 2) that even after receiving the March 31 Letter, Fox had ample time to file his appeal.

Moreover, Fox misstates the service requirements under the SEC Rules of Practice. (Motion p. 9). although the SEC's Rules are not applicable to NYSE disciplinary proceedings, even if they did apply, the Demand For Review would not have been timely filed. Fox relies upon SEC Rules 141 and 150 (Motion p. 2, 5). However, as found in the Order, such SEC Rules provide that "written decisions by a hearing officer, documents that are analogous to NYSE Hearing Panel Decisions, service may be 'complete upon mailing.'" (Order p. 3).

Indeed, in an earlier proceeding in this matter, Fox himself acknowledged that service is complete upon mailing. In Fox's "Motion to Strike; And/Or Extraordinary Motion For Additional Time" that was served upon NYSE Regulation on July 31, 2003, in reference to the SEC Rules, Fox stated that "delivery by U.S. mail is complete upon mailing." (Fox Motion to Strike, July 31, 2003, bold and underline in original, ¶ 6).

Fox further argues that there is insufficient proof that the March 31 Letter was actually mailed on that date. In connection thereto, in an order dated September 28, 2006, the SEC ordered the NYSE to file with the SEC evidence to establish the date on which Fox was served with a copy of the March 27, 2006 hearing panel decision. The NYSE complied with this order by sending to the SEC a letter dated October 4,

2006, together with relevant exhibits. As stated therein, in addition to the letter from the NYSE being dated March 31, 2006, documentation evidencing that the March 31 Letter was actually mailed to Fox on that date as contained in a document that Fox filed with the NYSE titled "Response to Enforcement Division Letter Dated May 2, 2006" (the "Fox Response").[1] Part of the Fox Response is a photocopy of the certified mail envelope for the March 31 Letter, which shows a post mark date of March 31, 2006, establishing that the letter was, in fact, mailed on that date. Thus, based upon this evidence, the SEC properly determined in the Order that the evidence submitted by the NYSE "including copies of a postmarked envelope and certified mail receipts, establishes that the NYSE mailed the Hearing Panel Decision to Fox on March 31, 2006."

Fox takes issue with whether the envelope for the March 31 Letter contains a postmark or a postal meter mark; however, it is the usual practice of the NYSE that mail is delivered to the U.S. Post Office the same day that postage is applied. Thus, pursuant to the usual practice of the NYSE, postage that is affixed to an envelope containing a postal meter mark is delivered to the post office on the same day as that reflected by the postal meter.

Although Fox claims that the sending by certified mail of the March 31 Letter was defective because the certified mail receipt does not contain either Fox's mailing address or a "round-date" (Motion p. 5-6), as Fox himself agrees, he did in fact receive the certified copy of the March 31 Letter. Moreover, Fox's allegations concerning the requirements pertaining to certified mailing do not lend any support to Fox's

[1] A copy of this document is contained in the Index .

unsupported allegations that the March 31 Letter was. not actually mailed on that date. (Motion p. 2-8). Indeed, NYSE Rule 476 does not contain any requirement that decisions be sent by certified mail.

Fox makes other outrageous and totally unsupported claims, such as the supposed lack of proof that the March 31 Letter was even sent by certified mail. (Motion p. 6). However,
as seen in the attachments to the October 4, 2006 letter from the NYSE to the SEC, the envelope used to mail the March 31 Letter (the copy of which was provided to the NYSE by Fox himself) and the return receipt for the certified mailing (which was signed by Fox) contain the same certified mail item number (#7003-3110-0002-1044-6349). Fox has never alleged that the signature on the return receipt was not his own signature.

Thus, Fox's claims that he was not served until April 6, 2006 are frivolous, unsupported by the facts or the rules of the NYSE, and should therefore be denied.

CONCLUSION

As the Order makes clear, the NYSE rules and the March 31 Letter itself dictate that the 25 day period for Fox to appeal the Decision began on March 31, 2006, and Fox's arguments that the March 31 Letter was not actually mailed on that date are unsupported and without merit. For all the foregoing reasons, NYSE Regulation respectfully requests that the SEC deny Fox's Motion for Reconsideration, and to affirm and sustain in all respects the SEC Order dated November 30, 2006.

Dated: December 15, 2006

Respectfully submitted:
DIVISION OF
ENFORCEMENT NYSE

REGULATION, INC.
14 WALL ST 14TH Fl.
NEW YORK, NY 10005
(212) 656-2600

Of Counsel:

Susan Light, Esq.
Vice President

Steven F. Korostoff, Esq.
Enforcement Director

Steven M. Tanner, Esq.
Senior Trial Counsel

UNITED STATES
POSTAL SERVICE

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Search Results

Label/Receipt Number: ET81 8117 236U S
Detailed Results:

X **Delivered, January 04, 2007, 10:23 am, NEW YORK, NY 10005**
X **Enroute, January 03, 2007, 4:31 pm, WEST PALM BEACH, FL 33406**
X **Unclaimed, January 03, 2007, 11:19 am, JUPITER, FL**
X **Notice Left, December 16, 2006, 10:14 am, JUPITER, FL 33468**
X **Arrival at Unit, December 16, 2006, 9:56 am, JUPITER, FL 33458**
X **Acceptance, December 15, 2006, 2:31 pm, NEW YORK, NY 10004**

Mail History of NYSE Opposition to Fox's SEC Motion for Rehearing